

AMENDED IN ASSEMBLY APRIL 8, 2010

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2773**

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**Introduced by ~~Committee on Labor and Employment (Monning (Chair), Eng, Furutani, Ma, and Portantino)~~ Assembly Member Swanson**

March 1, 2010

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~~An act to amend Section 12940 of the Government Code, relating to employment.~~ *An act to amend Section 1033 of the Code of Civil Procedure, relating to civil actions.*

LEGISLATIVE COUNSEL'S DIGEST

AB 2773, as amended, ~~Committee on Labor and Employment Swanson. Discrimination in employment. Civil actions: costs.~~

*Existing law provides that a prevailing party is entitled as a matter of right to recover costs in any action or proceeding, and specifies those items allowable as costs. Existing law provides that costs, or any portion of claimed costs, shall be as determined by the court, in its discretion, in a case other than a limited civil case, if the prevailing party recovers a judgment that could have been rendered in a limited civil case.*

*This bill would exempt from that latter provision an action brought under a specified provision of the Fair Employment and Housing Act alleging an unlawful practice.*

~~Existing law, the Fair Employment and Housing Act, protects and safeguards the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of race, religious creed, color, national origin, ancestry, physical disability,~~

~~mental disability, medical condition, marital status, sex, age, or sexual orientation.~~

~~This bill would make nonsubstantive changes to these provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1     *SECTION 1. Section 1033 of the Code of Civil Procedure is*  
2     *amended to read:*

3     1033. (a) Costs, or any portion of claimed costs, shall be as  
4     determined by the court, in its discretion, in a case other than a  
5     limited civil case, in accordance with Section 1034 ~~where if~~ the  
6     prevailing party recovers a judgment that could have been rendered  
7     in a limited civil case. *This subdivision shall not apply to any*  
8     *action brought under Section 12965 of the Government Code.*

9     (b) ~~When~~ *If* a prevailing plaintiff in a limited civil case recovers  
10    less than the amount prescribed by law as the maximum limitation  
11    upon the jurisdiction of the small claims court, the following shall  
12    apply:

13    (1) ~~When~~ *If* the party could have brought the action in the small  
14    claims division but did not do so, the court may, in its discretion,  
15    allow or deny costs to the prevailing party, or may allow costs in  
16    part in any amount as it deems proper.

17    (2) ~~When~~ *If* the party could not have brought the action in the  
18    small claims court, costs and necessary disbursements shall be  
19    limited to the actual cost of the filing fee, the actual cost of service  
20    of process, and, ~~when if~~ otherwise specifically allowed by law,  
21    reasonable ~~attorneys'~~ *attorney's* fees. However, those costs shall  
22    ~~only~~ be awarded to the plaintiff *only* if the court is satisfied that  
23    prior to the commencement of the action, the plaintiff informed  
24    the defendant in writing of the intended legal action against the  
25    defendant and that legal action could result in a judgment against  
26    the defendant that would include the costs and necessary  
27    disbursements allowed by this paragraph.

28    ~~SECTION 1. Section 12940 of the Government Code is~~  
29    ~~amended to read:~~

30    ~~12940. It is an unlawful employment practice, unless based~~  
31    ~~upon a bona fide occupational qualification, or, except where based~~

1 upon applicable security regulations established by the United  
2 States or the State of California:

3 (a) For an employer, because of the race, religious creed, color,  
4 national origin, ancestry, physical disability, mental disability,  
5 medical condition, marital status, sex, age, or sexual orientation  
6 of any person, to refuse to hire or employ the person or to refuse  
7 to select the person for a training program leading to employment,  
8 or to bar or to discharge the person from employment or from a  
9 training program leading to employment, or to discriminate against  
10 the person in compensation or in terms, conditions, or privileges  
11 of employment.

12 (1) This part does not prohibit an employer from refusing to  
13 hire or discharging an employee with a physical or mental  
14 disability, or subject an employer to any legal liability resulting  
15 from the refusal to employ or the discharge of an employee with  
16 a physical or mental disability, where the employee, because of  
17 his or her physical or mental disability, is unable to perform his  
18 or her essential duties even with reasonable accommodations, or  
19 cannot perform those duties in a manner that would not endanger  
20 his or her health or safety or the health or safety of others even  
21 with reasonable accommodations.

22 (2) This part does not prohibit an employer from refusing to  
23 hire or discharging an employee who, because of the employee's  
24 medical condition, is unable to perform his or her essential duties  
25 even with reasonable accommodations, or cannot perform those  
26 duties in a manner that would not endanger the employee's health  
27 or safety or the health or safety of others even with reasonable  
28 accommodations. Nothing in this part shall subject an employer  
29 to any legal liability resulting from the refusal to employ or the  
30 discharge of an employee who, because of the employee's medical  
31 condition, is unable to perform his or her essential duties, or cannot  
32 perform those duties in a manner that would not endanger the  
33 employee's health or safety or the health or safety of others even  
34 with reasonable accommodations.

35 (3) Nothing in this part relating to discrimination on account of  
36 marital status shall do either of the following:

37 (A) Affect the right of an employer to reasonably regulate, for  
38 reasons of supervision, safety, security, or morale, the working of  
39 spouses in the same department, division, or facility, consistent  
40 with the rules and regulations adopted by the commission.

1 ~~(B) Prohibit bona fide health plans from providing additional~~  
2 ~~or greater benefits to employees with dependents than to those~~  
3 ~~employees without or with fewer dependents.~~

4 ~~(4) Nothing in this part relating to discrimination on account of~~  
5 ~~sex shall affect the right of an employer to use veteran status as a~~  
6 ~~factor in employee selection or to give special consideration to~~  
7 ~~Vietnam-era veterans.~~

8 ~~(5) This part does not prohibit an employer from refusing to~~  
9 ~~employ an individual because of his or her age if the law compels~~  
10 ~~or provides for that refusal. Promotions within the existing staff,~~  
11 ~~hiring or promotion on the basis of experience and training, rehiring~~  
12 ~~on the basis of seniority and prior service with the employer, or~~  
13 ~~hiring under an established recruiting program from high schools,~~  
14 ~~colleges, universities, or trade schools do not, in and of themselves,~~  
15 ~~constitute unlawful employment practices.~~

16 ~~(b) For a labor organization, because of the race, religious creed,~~  
17 ~~color, national origin, ancestry, physical disability, mental~~  
18 ~~disability, medical condition, marital status, sex, age, or sexual~~  
19 ~~orientation of any person, to exclude, expel, or restrict from its~~  
20 ~~membership the person, or to provide only second-class or~~  
21 ~~segregated membership or to discriminate against any person~~  
22 ~~because of the race, religious creed, color, national origin, ancestry,~~  
23 ~~physical disability, mental disability, medical condition, marital~~  
24 ~~status, sex, age, or sexual orientation of the person in the election~~  
25 ~~of officers of the labor organization or in the selection of the labor~~  
26 ~~organization's staff or to discriminate in any way against any of~~  
27 ~~its members or against any employer or against any person~~  
28 ~~employed by an employer.~~

29 ~~(c) For any person to discriminate against any person in the~~  
30 ~~selection or training of that person in any apprenticeship training~~  
31 ~~program or any other training program leading to employment~~  
32 ~~because of the race, religious creed, color, national origin, ancestry,~~  
33 ~~physical disability, mental disability, medical condition, marital~~  
34 ~~status, sex, age, or sexual orientation of the person discriminated~~  
35 ~~against.~~

36 ~~(d) For any employer or employment agency to print or circulate~~  
37 ~~or cause to be printed or circulated any publication, or to make~~  
38 ~~any non-job-related inquiry of an employee or applicant, either~~  
39 ~~verbal or through use of an application form, that expresses,~~  
40 ~~directly or indirectly, any limitation, specification, or discrimination~~

1 as to race, religious creed, color, national origin, ancestry, physical  
2 disability, mental disability, medical condition, marital status, sex,  
3 age, or sexual orientation, or any intent to make any such limitation,  
4 specification, or discrimination. This part does not prohibit an  
5 employer or employment agency from inquiring into the age of  
6 an applicant, or from specifying age limitations, where the law  
7 compels or provides for that action.

8 (e) (1) Except as provided in paragraph (2) or (3), for any  
9 employer or employment agency to require any medical or  
10 psychological examination of an applicant, to make any medical  
11 or psychological inquiry of an applicant, to make any inquiry  
12 whether an applicant has a mental disability or physical disability  
13 or medical condition, or to make any inquiry regarding the nature  
14 or severity of a physical disability, mental disability, or medical  
15 condition.

16 (2) Notwithstanding paragraph (1), an employer or employment  
17 agency may inquire into the ability of an applicant to perform  
18 job-related functions and may respond to an applicant's request  
19 for reasonable accommodation.

20 (3) Notwithstanding paragraph (1), an employer or employment  
21 agency may require a medical or psychological examination or  
22 make a medical or psychological inquiry of a job applicant after  
23 an employment offer has been made but prior to the  
24 commencement of employment duties, provided that the  
25 examination or inquiry is job-related and consistent with business  
26 necessity and that all entering employees in the same job  
27 classification are subject to the same examination or inquiry.

28 (f) (1) Except as provided in paragraph (2), for any employer  
29 or employment agency to require any medical or psychological  
30 examination of an employee, to make any medical or psychological  
31 inquiry of an employee, to make any inquiry whether an employee  
32 has a mental disability, physical disability, or medical condition,  
33 or to make any inquiry regarding the nature or severity of a physical  
34 disability, mental disability, or medical condition.

35 (2) Notwithstanding paragraph (1), an employer or employment  
36 agency may require any examinations or inquiries that it can show  
37 to be job-related and consistent with business necessity. An  
38 employer or employment agency may conduct voluntary medical  
39 examinations, including voluntary medical histories, which are

1 part of an employee health program available to employees at that  
2 worksite.

3 ~~(g) For any employer, labor organization, or employment agency~~  
4 ~~to harass, discharge, expel, or otherwise discriminate against any~~  
5 ~~person because the person has made a report pursuant to Section~~  
6 ~~11161.8 of the Penal Code that prohibits retaliation against hospital~~  
7 ~~employees who report suspected patient abuse by health facilities~~  
8 ~~or community care facilities.~~

9 ~~(h) For any employer, labor organization, employment agency,~~  
10 ~~or person to discharge, expel, or otherwise discriminate against~~  
11 ~~any person because the person has opposed any practices forbidden~~  
12 ~~under this part or because the person has filed a complaint, testified,~~  
13 ~~or assisted in any proceeding under this part.~~

14 ~~(i) For any person to aid, abet, incite, compel, or coerce the~~  
15 ~~doing of any of the acts forbidden under this part, or to attempt to~~  
16 ~~do so.~~

17 ~~(j) (1) For an employer, labor organization, employment agency,~~  
18 ~~apprenticeship training program or any training program leading~~  
19 ~~to employment, or any other person, because of race, religious~~  
20 ~~creed, color, national origin, ancestry, physical disability, mental~~  
21 ~~disability, medical condition, marital status, sex, age, or sexual~~  
22 ~~orientation, to harass an employee, an applicant, or a person~~  
23 ~~providing services pursuant to a contract. Harassment of an~~  
24 ~~employee, an applicant, or a person providing services pursuant~~  
25 ~~to a contract by an employee, other than an agent or supervisor,~~  
26 ~~shall be unlawful if the entity, or its agents or supervisors, knows~~  
27 ~~or should have known of this conduct and fails to take immediate~~  
28 ~~and appropriate corrective action. An employer may also be~~  
29 ~~responsible for the acts of nonemployees, with respect to sexual~~  
30 ~~harassment of employees, applicants, or persons providing services~~  
31 ~~pursuant to a contract in the workplace, where the employer, or~~  
32 ~~its agents or supervisors, knows or should have known of the~~  
33 ~~conduct and fails to take immediate and appropriate corrective~~  
34 ~~action. In reviewing cases involving the acts of nonemployees, the~~  
35 ~~extent of the employer's control and any other legal responsibility~~  
36 ~~which the employer may have with respect to the conduct of those~~  
37 ~~nonemployees shall be considered. An entity shall take all~~  
38 ~~reasonable steps to prevent harassment from occurring. Loss of~~  
39 ~~tangible job benefits shall not be necessary in order to establish~~  
40 ~~harassment.~~

1     ~~(2) The provisions of this subdivision are declaratory of existing~~  
2 ~~law, except for the new duties imposed on employers with regard~~  
3 ~~to harassment.~~

4     ~~(3) An employee of an entity subject to this subdivision is~~  
5 ~~personally liable for any harassment prohibited by this section that~~  
6 ~~is perpetrated by the employee, regardless of whether the employer~~  
7 ~~or covered entity knows or should have known of the conduct and~~  
8 ~~fails to take immediate and appropriate corrective action.~~

9     ~~(4) (A) For purposes of this subdivision only, "employer" means~~  
10 ~~any person regularly employing one or more persons or regularly~~  
11 ~~receiving the services of one or more persons providing services~~  
12 ~~pursuant to a contract, or any person acting as an agent of an~~  
13 ~~employer, directly or indirectly, the state, or any political or civil~~  
14 ~~subdivision of the state, and cities. The definition of "employer"~~  
15 ~~in subdivision (d) of Section 12926 applies to all provisions of this~~  
16 ~~section other than this subdivision.~~

17     ~~(B) Notwithstanding subparagraph (A), for purposes of this~~  
18 ~~subdivision, "employer" does not include a religious association~~  
19 ~~or corporation not organized for private profit, except as provided~~  
20 ~~in Section 12926.2.~~

21     ~~(C) For purposes of this subdivision, "harassment" because of~~  
22 ~~sex includes sexual harassment, gender harassment, and harassment~~  
23 ~~based on pregnancy, childbirth, or related medical conditions.~~

24     ~~(5) For purposes of this subdivision, "a person providing services~~  
25 ~~pursuant to a contract" means a person who meets all of the~~  
26 ~~following criteria:~~

27     ~~(A) The person has the right to control the performance of the~~  
28 ~~contract for services and discretion as to the manner of~~  
29 ~~performance.~~

30     ~~(B) The person is customarily engaged in an independently~~  
31 ~~established business.~~

32     ~~(C) The person has control over the time and place the work is~~  
33 ~~performed, supplies the tools and instruments used in the work,~~  
34 ~~and performs work that requires a particular skill not ordinarily~~  
35 ~~used in the course of the employer's work.~~

36     ~~(k) For an employer, labor organization, employment agency,~~  
37 ~~apprenticeship training program, or any training program leading~~  
38 ~~to employment, to fail to take all reasonable steps necessary to~~  
39 ~~prevent discrimination and harassment from occurring.~~

~~(l) For an employer or other entity covered by this part to refuse to hire or employ a person or to refuse to select a person for a training program leading to employment or to bar or to discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by this part demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer or other entity covered by this part. Religious belief or observance, as used in this section, includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.~~

~~(m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation.~~

~~(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.~~

~~(o) For an employer or other entity covered by this part, to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic.~~